IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.678 of 1992

Devappa Tatya Chougule ..Appellant
(Orig.defendant)

V/s

1. Annasaheb Bhau Chougule
2. Raosaheb Bhau Chougule
3. Sattu Bhau Chougule
4. Smt.Ratnabai Bhau Chougule
5. Sou. Malti Annasaheb Bolwade
6. Sou.Shailabai Bhupal Bhosekar
7. Smt.Akkatai Shripal Desai ..Respondents
(Orig.plaintiffs)

Smt. S.S.Deshpande holding for Mr.B.P.Apte for Appellant

Mr.A.P.Vaze for Respondent nos.1 to 7

CORAM:S.R.SATHE,J.

DATED:30th July 2004

ORAL JUDGMENT :-

1. Being aggrieved by the judgment and order passed by the Court of Additional Sessions Judge, Sangli in Regular Civil Appeal No.21 of 1987 whereby the order dismissing the plaintiffs' suit, passed by the Court of 2nd Joint Civil Judge,J.D.,Miraj in Regular Civil Suit no.168 of 1980 was set aside and the appeal was allowed and decree for partition and possession was passed in favour of the plaintiff, the original defendant has preferred this second appeal.

2. The brief facts giving rise to the present second appeal are as under :

. The suit property bearing Survey No.183/1 situated at village Bhose, Taluka Miraj,District Sangli which is subsequently numbered as Gat No.675 was owned by Bhau Nemisha Chougule and father of defendant. The said property was accordingly standing in the name of plaintiff's predecessor in title as well as father of defendant till the year 1970. However, when Consolidation Scheme was made applicable in the year 1970 the name of defendant was entered in the record of rights as a sole owner of the said property. When the plaintiffs came to know about the same, they filed Civil Suit NO.168 of 1980 for partition and possession. The defendant filed his written statement and opposed the suit claim and

contended that suit property was not owned and possessed by the plaintiffs or their predecessor in title and suit land was in his possession for last several years and suit is barred by Section 27 of Limitation Act. On these pleadings the learned trial Judge framed the issues at Exh.19 and after considering the' evidence adduced by both the parties, the learned trial Judge came to the conclusion that plaintiffs have failed to prove that they are owners of the suit property to the extent of half portion as alleged by them and as such they are not entitle for partition and possession as claimed. The plaintiffs' suit was therefore dismissed.

3. Being aggrieved by the same the plaintiffs preferred appeal being Regular Civil Appeal No.4 of 1987 in the Court of Additional District Judge, Sangli. After hearing the arguments of both the learned Advocates and perusing the evidence on record, the first Appellate Court came to the conclusion that finding recorded by the trial Judge with regard to ownership is incorrect and evidence on record was sufficient to hold that plaintiffs are owners of the suit land to the extend of half share. He also held that suit is not barred by law of limitation and plaintiffs are entitled for decree for partition and possession. He therefore, allowed the appeal and passed decree

for partition and possession.

4. Being aggrieved by the same the defendant has filed this Second Appeal.

5. From perusal of the record it appears that following substantial questions of law have been formulated in the instant case,

i. Whether the lower Appellate Court erred in law in ignoring the record of ownership after the consolidation scheme came into force?

ii. Whether the suit was barred by limitation in view of the provisions of Article 64 read with Section 27 of Limitation Act?

iii. Whether the lower Appellate Court exercised jurisdiction not vesting in the Civil Court while over riding the holding as finalised by the Consolidation officer in Consolidation proceedings under the provisions of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947?

6. In this appeal before me the learned Advocate for the Appellant submitted that first Appellate Court should have taken into consideration the fact that after consolidation scheme was made

applicable the name of the present defendant was entered in the suit land as owner and under such circumstances there was no reason for the first Appellate Court to hold that the plaintiffs had share in the suit property. It is true that when the consolidation scheme was made applicable in the year 1970 the name of the defendant has been entered in the record of rights as owner of the land in question. However, the question arises on what basis the said name was entered, particularly when prior to application of Consolidation scheme the name of plaintiff's predecessor in title was shown as joint owner of the said property. From perusal of the judgment of the first Appellate Court it appears that the Court has taken into consideration the entire record including the old record of the year 1926, in which the name of plaintiff's predecessor in title was entered in the record of rights as owner of 8 annas share. He has also observed that there is nothing to indicate as to on what basis the said joint record was revived and name of the plaintiff's predecessor Bhau Nemisha Chougule was struck of from the revenue record.The defendant had also not adduced any cogent evidence to show as to on what basis the change in the names was effected in the year 1970. It is an admitted fact that defendant's father Tatya was cousin brother of plaintiff's grand father by name Nemisha and both

of them were shown as owners of the suit property. So, on the basis of old record and admitted position of facts the learned lower Appellate Court has observed that plaintiffs are having half share in the suit land. I think that the said finding is legal and correct and there is no reason to interfere with the same.

7. The learned Advocate for the Appellant canvassed before me that in view of the provisions of Article 64 read with Section 27 of Limitation Act, 1963 the suit was time barred. It would be worthwhile to see what Article 64 and Section 27 of the Limitation Act say:

Description of suit	Period of limitation	Time from which period starts
Art 64. For possession of immovable property based on previous possession and not on title, when the plaintiff while in possession of the property has been disposed.	Twelve years	The date of dispossession.

Section 27 : Extinguishment of right to property - At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.

7. While considering this question one has to take into consideration averments in the written statement. From the perusal of the same it is

very clear that though the defendant had contended that the plaintiff was not at all owner of the suit property and he was never in possession of the same, the defendant had not taken specific plea with regard to adverse possession. They had simply said that suit is barred bylaw of limitation. Even from perusal of the evidence, it appears that the name of the plaintiff's predecessor in title was in fact appearing in the record of right till the year 1970. The present suit is filed on 14-7-1980 when the name of plaintiff's predecessor in title was appearing in the record of rights as owner until 1970 and when there is nothing on record to indicate that defendant was in exclusive possession of the suit property and that too by alleging hostile title, it cannot be said that defendant no.1 became owner of the suit property by virtue of adverse possession. Under these circumstances the learned first Appellate Court has rightly held that the suit is not barred bylaw of limitation.

8. The third point that has been urged before me by the learned Advocate for the Appellant is that Civil Court had in fact no jurisdiction to try the present suit. For this purpose reliance has been placed on Section 36 B of Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947. The said section runs as follows :-

> 36B (1) If any suit instituted in any Civil Court or Mamlatdar’s Court involves any issues which are required to be settled, decided or dealt with by any authority competent to settle, decide or deal with such issues under this act (hereinafter referred to as the competent authority) the Civil Court or Mamlatdar’s Court shall stay the suit and refer such issue to such competent authority for determination.
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> (2) On receipt of such reference from the Civil Court or Mamlatdar’s Court,the competent authority shall deal with and decide such issues in accordance with the provisions of this Act and shall communicate its decision to the Civil Court or Mamlatdar’s Court and such Court shall thereupon dispose of the suit in accordance with the procedure applicable thereto.

If we take into consideration the averment in the plaint,it is very clear that the suit was for partition and possession. Even if taking into consideration the contentions raised by the defendant,it cannot be said that there was any

question or issue which was required to be settled by the authority constituted under the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947. The suit being simplicitor for partition and possession, it was necessary to see whether the plaintiffs were having any a share in the suit property and whether they were entitled for partition. The first Appellate Court came to the conclusion that the plaintiffs are having one half share in the suit property and as such he decreed the plaintiff's suit.While doing so the appellate court has specifically directed that a preliminary decree be drawn and reference and precept be sent to the Collector,Sangli for partition and separate possession of the suit land. If necessary the plaintiffs shall apply to the Consolidation Officer for permission to make division of the suit land. It is very clear that such directions were given having regard to the provisions of Section 31 of Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947. The said Sections runs as under :-

> 31. (1) Notwithstanding anything contained in any law for the time being in force,no holding allotted under this Act, nor any part thereof shall save as otherwise provided in this section -

(a) be transferred, whether by way of sale (including sale in execution of a decree of a Civil Court or for recovery of arrears of land revenue or for sums recoverable as arrears of land revenue) or by way of gift, exchange,lease,or otherwise; or

(b) be sub-divided, whether under a decree or order of a Civil Court or any other competent authority,or otherwise, so as to create a fragment, without the previous sanction of the Collector.Such sanction shall be given by the Collector in such circumstances and subject to such conditions as maybe prescribed.

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Relying on the above mentioned provisions, the learned Advocate for the plaintiffs argued before me that looking to the nature of the suit it was not at all necessary for the Court to stay the matter or to refer the same to the competent authority under the Consolidation Act. For this purpose he has drawn my attention to the case of Sidagonda Avagonda Sardar Patil and Anr v/s Bhimgonda Kadgonda Kushappa Patil deceased by his heirs Babgonda @ Kadgonda B.K.Patil and Ors

reported in 2002(2) Mh.L.J. 623 wherein learned single Judge of this Court has held that when party is seeking possession of certain land which formed part of consolidated block then party to first approach the appellate Court to establish his title to the said land and thereafter to Collector to seek sub division of the said land from consolidated block. So in view of this ruling it is very clear that first Appellate Court was justified in passing decree for partition and possession and directing that if necessary the matter be referred to the competent court for sub division. Thus it is very clear that there is no substance in the arguments advanced by the learned Advocate for the defendants in this behalf.

9. From perusal of the judgment of the first Appellate court, it is very clear that Court has properly considered the evidence on record and has correctly held that plaintiff is having one half (1/2) share and he is entitled for partition and separate possession. The said finding is legal and correct. There is no necessity to interfere with the same. In this view of the matter, there is no substance in the appeal. The appeal is dismissed with costs.

10. Certified copy expedited.

(S.R.SATHE,J.)

To
The Assistant Commissioner
Mumbai Municipal Corporation,
L Ward, Kurla (West)
Mumbai 400 070 Dated: 2nd Aug.2004

Sub: In the matter of illegal demolition of the wall inside the premises bearing NO.493, 2A, Laxmi Surve Niwas New Mill Road,Kurla (West),Mumbai-70 by Shri Hiren Maganlal Gada (Laxmi Electricals)

Sir,

. I am concerned for my client Shri Ramesh R. Surve, residing at C/14-15, B.M.C. Colony, New Mill Road, Kurla (West), Mumbai 400 070 and as per his instructions I have to state as under:-

2. I say that one Shri Hiren Maganlal Gada (Laxmi Electricals) has illegally demolished the wall inside the premises which has crated tremendous danger to the entire structure. My client has already sent notice to this effect on 12-2-2004 to your Hon’ble authority. My client states that the said Gada has made several internal changes without permission of my client and therefore the said act of changing the internal part of the premises cause tremendous danger to the entire structure. My client states that the said act on the part of the said Hiren M. Gada is in violation of rules framed by the Corporation and therefore action is to be taken immediately

against him.

3. It is also necessary to point out to your Hon’ble authority that Shri Hiren M. Gada has also covered verandah illegally and without taking any permission as per law. Because of illegal changes which has been made the neighbouring wall is cracked and there is a risk of collapse of the said chawl.

4. Under these circumstances my client hereby request to your Hon’ble authority to take immediate action with regard to the illegal changes which has been made in the premises situated at 493 2A, Laxmi Surve Niwas, New Mill Road, Kurla (West), Mumbai 400070 by Shri Hiren M. Gada (Laxmi Electricals).

Thanking you,

Yours faithfully,

Advocate High Court